> "...For the reasons explained above, we find the record does not contain data sufficient to evaluate the extent of wireless substitution in the specific markets at issue. We therefore do not need to address the merits of arguments regarding the inclusion of wireless substitution in our UNE forbearance analysis."

The ACC believes that with respect to Qwest's obligations under Section 251, it is more appropriate to look only at wireline competition. This is consistent with the FCC's own comments in the *TRRO* where it indicated that significant facilities based competition by a cable provider could form the basis for forbearance of the Section 251 UNE obligation.

We agree with the comments of several parties[27] that:

> "In the *Omaha Forbearance Order*, the Commission found, among other things, that because Qwest had not submitted sufficient data showing how VoIP and wireless services are substitutes to Section 251(c)(3) loop and transport facilities, it did not rely on 'intermodal competition from wireless and interconnected VoIP services to rationalize forbearance from unbundling obligations.' In addition, the Commission has repeatedly and correctly held that intermodal competition from wireless and VoIP providers is not a significant source of competitive restraint on traditional ILEC wireline services nor could it be deemed an equivalent substitute to an IIEC's wireline service."

In addition, it is very important to note that the UNE analysis is done on a wire-center basis. It is the ACC's understanding that the wireless cut-the-cord surveys are all done on an MSA basis. Utilization of MSA wide data to make conclusions about wireless market share in specific wirecenters would not be appropriate.

Finally, as several commenting parties[28] pointed out:

> "...[W]ireless service should not be counted as an intermodal competitor because major wireless carriers remain heavily dependent on ILEC special access and transport services and because wireless service is not a viable substitute for wireline last mile facilities. In the *TRRO*, the Commission recognized that "CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity. This applies equally in both the residential and

[27] Opposition of Covad Communications Company; Alpheus Communications, L.P.; U.S. Telepacific Corp. and Mpower Communications Corp., Both D/B/A Telepacific Communications; First Communications, Inc.; Deltacom, Inc.; Trueom LLC D/B/A CityNet – Arizona; and TDS Metrocom, LLC.
[28] *Id.*

> business markets. It also applies to fixed wireless, which the Commission found did 'not ... offer significant competition in the business loop market.'"

We also urge the FCC to exclude Qwest's QPP/QLSP and resold lines from the market share calculations for the reasons discussed above. We believe that this is consistent with prior FCC practice. While the residential market share in Phoenix would not be impacted to any great degree if it were included, we believe that it is better excluded because there is no assurance that the same level of competition would continue if forbearance were granted. In fact, based upon the McLeod experience, there is every reason to conclude that it would not be the same.

Cox's residential share standing alone does not support Qwest's release from its Section 251 obligations in the Phoenix MSA. In its last *Qwest 4 MSA Order*, the FCC stated: "Our analysis extends beyond this point because we do not rely on market share as the 'sole determining factor in deciding' the outcome of this proceeding."[29] Under a market power analysis, and when the forbearance legal standards are considered, Qwest is not entitled to relief.

2. The Legal Standards Are Not Met for the Residential Market.

Forbearance from Section 251 obligations for residential service in the Phoenix MSA would not be in the public interest. The market share of facilities-based wireline providers (largely Cox in the residential market) is not enough. In addition, as Confidential Exhibit 4 shows that other than Cox, the facilities based competition Qwest cites is exaggerated. Based upon this alone, and the prior *Qwest 4 MSA* Order, Qwest should not receive forbearance from Section 251(c) requirements in the residential market in the Phoenix MSA.

An argument could be made that there are not many carriers utilizing Qwest's UNEs to provide residential service in the Phoenix MSA, and therefore there would be no harm in doing away with Qwest's obligations in this regard. But, on the other hand, since

[29] *Qwest MSA 4* Order at footnote 4.

there are not many carriers utilizing Qwest's facilities to provide residential service, any impact upon Qwest that forbearance would produce would be minimal.

Importantly, the evidence shows that outside of Cox, the other wireline competitors in the Phoenix MSA rely for the most part upon Qwest's facilities. Any action on the FCC's part eliminating Qwest's obligation to provide these elements under Section 251 will likely be enough to drive this little bit of competition out of the Phoenix residential market. In the end, forbearance in the residential market in the Phoenix MSA will simply act to ensure that no further competition develops by taking away an important alternative available to carriers to provision service using Qwest's facilities. As proof of this, one need only look at the result that the elimination of UNE-P produced in the Phoenix MSA.

The McLeod experience in Omaha shows that at least one significant competitor in that market had to exit as a direct result of forbearance and the significant price increases that resulted. These price increases would necessarily be passed on to consumers. This is likely to be the result if Qwest is granted forbearance of its UNE obligations in the residential market in the Phoenix MSA. This would not be in the public interest.

Where the Commission has found an incumbent carrier to be non-dominant in the provision of access services, it had a retail market share of less than 50% and faced significant facilities-based competition. [30] This is not the case in the Phoenix MSA.

IV. SECTION 271 RELIEF WOULD BE INAPPROPRIATE AT THIS TIME.

In the Omaha case, the FCC denied Qwest's request for forbearance from Section 271 checklist items 4, 5 and 6, which establish independent obligations to provide unbundled access to local loops, local transport and local switching. It relied upon the

[30] *Id.* at p. 16.

continued availability of wholesale access to Qwest's network under Section 271 in forbearing from Section 251(c)(3).

Certainly if Section 251(c)(3) relief is not warranted, Section 271 relief is not warranted either. Further, Section 271 requirements are an important safeguard if and when the FCC finds that Qwest is entitled to 251(c)(3) relief.

In addition, before Section 271 relief would be appropriate, we believe that the FCC needs to first address the issues raised in the Petition for Expedited Rulemaking[31] filed recently by the Section 271 Coalition. As the Petition points out, the Courts have rejected state enforcement of Checklist obligations. We believe that determinations regarding the issues raised in the CLEC's request may be necessary for those Checklist Items to be "fully implemented" for purposes of forbearance.

V. QWEST DOES NOT MEET THE STANDARD FOR FORBEARANCE FROM *COMPUTER III* REQUIREMENTS.

Finally, the ACC does not support Qwest's request for forbearance of *Computer III* requirements. Qwest has not demonstrated that it has met the legal standard for forbearance and that forbearance from these requirements would be in the public interest. The FCC found in the last case that "...there is no evidence in the record demonstrating why, on balance, the *Computer III* requirements are not necessary to ensure that the 'charges, practices, classifications, or regulations...for [] or in connection with [Qwest's local exchange and exchange access services] are just and reasonable and are not unjustly or unreasonably discriminatory. And necessary for the protection of consumers.'" [32] The same conclusion can be reached in this case based upon the scant evidence on this issue. Moreover, the following finding in both the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order* is also pertinent here:

---

[31] *See In the Matter of Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. Section 271(c)(2)(B) of the Act, WC Docket No. 09-___;* filed on November 9, 2009.

[32] *Qwest 4 MSA Order* at para. 44.

"...the Commission adopted the *Computer II* structural safeguards and the *Computer III* non-structural safeguards in order to prevent the BOCs from using 'exclusionary market power' arising from their control over ubiquitous local telephone networks to impede competition in the enhanced services market. The record here does not demonstrate that Qwest no longer possesses exclusionary market power, and thus as in the Qwest Section *272 Sunset Order*, we must assume that Qwest still possesses such market power. Qwest's exercise of exclusionary market power could both lead to "charges, practices, classifications, or regulations ... for[] or in connection with' Qwest's interexchange services that are unjust, unreasonable, or 'unjustly or unreasonably discriminatory' and could harm consumers." [33]

VI. CONCLUSION.

Qwest does not meet the standards for forbearance of important Dominant Carrier requirements, Section 251(c) and Section 271 unbundling requirements and *Computer III* requirements in the Phoenix MSA at this time. The ACC respectfully requests that the FCC deny Qwest's petition at this time.

RESPECTFULLY SUBMITTED this 2nd day of March, 2010.

/s/ Maureen A. Scott

Janice M. Alward, Chief Counsel
Maureen A. Scott, Senior Staff Counsel

[33] *Id.*

HIGHLY CONFIDENTIAL

EXHIBIT NO. 1

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 2

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 3

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 4

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 5

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 6

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 7

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 8

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 9

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 10

REDACTED